

## APPEAL NO. 92024

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq.* (Vernon Supp. 1992). On December 11, 1991, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that appellant was entitled to reimbursement "as a supplementation of medical benefits" for travel expenses (mileage) incurred in driving from her residence in (city), Texas, to (city), Texas, for visits to physicians and to an imaging center, but not for her frequent visits to a physical therapy facility in (city). The hearing officer also ordered that the mileage for the approved travel be calculated for the shortest routes and that appellant reimburse respondent for excess travel expenses already paid by respondent, if any. On appeal, appellant contends that the hearing officer erred both in excluding her drives to and from the physical therapy facility in (city) as qualifying for travel expense reimbursement and in ordering her to reimburse respondent for any travel expenses that may have been paid her by respondent in excess of those ordered by the hearing officer. Appellant asks the Appeals Panel to reverse and render a decision that entitles appellant to reimbursement for her travel expenses to (city) for physical therapy and that determines that she has received no overpayment of travel expenses from respondent. Respondent, while not concurring in the hearing officer's findings and conclusions favorable to appellant, does not appeal from them. Respondent does concur in those findings and conclusions favorable to respondent and asks the Appeals Panel to sustain them. Respondent questions whether appellant's request for review was timely filed and, accordingly, whether this panel's jurisdiction was invoked. Respondent does not reurge on appeal its motion below in the nature of a plea to the jurisdiction of the hearing grounded on respondent's contention that the disputed issue should first have been addressed by the medical review division of the Texas Workers' Compensation Commission (Commission). However, that motion raised an issue which was jurisdictional in nature and cannot be waived. Accordingly, the correctness of the hearing officer's denial of that motion will be reviewed.

## DECISION

Finding that the dispute over reimbursement of appellant's travel expenses to (city), Texas, for physical therapy should have first been reviewed pursuant to the provisions of arts. 8308-8.21 and 8308-8.26 of the 1989 Act and of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.305 (TWCC Rules), we reverse the Decision and Order of the hearing officer and render a decision that the contested case hearing below was not the appropriate forum for the resolution of the issue disputed by the parties.

We observe at the outset that appellant's request for review was received on January 23, 1992, at the Commission's central office in (city), Texas, and was thus timely filed. See Rule 143.3 (TWCC Rules).

According to the Benefit Review Conference Report, which was made a part of the contested case hearing record and can therefore be considered, the disputed issue was

whether appellant's travel expenses for "medical treatment" were reasonable and necessary. Appellant contended that it was reasonable and necessary for her to travel from (city), Texas, where she resided, to (city), Texas, for medical treatment and that the \$535.14 already paid to her for travel expenses should not be paid back to respondent. Respondent contended that travel expenses were not due appellant because she resided in (city) with her mother; but, if appellant did live in (city), then travel expenses were not due her because "reasonable and necessary medical treatment" could be provided in (city). The benefit review officer recommended that appellant "is entitled to travel expenses as it was necessary for her to travel from (city) to (city) to obtain appropriate and necessary medical care." This officer further recommended that respondent should not be reimbursed for \$535.14 already paid to appellant.

At the contested case hearing the parties stipulated that appellant was an employee of (Employer) on (date of injury), that she alleged she incurred an injury on that date and has claimed workers' compensation benefits, and, that she has been treated by certain physicians. Respondent's counsel proposed the following stipulation of the issue at the hearing:

"We also stipulate that the issue today is whether or not she is allowed mileage reimbursement for trips she claims to have made between (city) and (city).

[Appellant's Counsel]: I agree that that is the issue that is presented here today for determination."

The hearing officer then stated his understanding of the issue as follows with clarification by respondent's counsel:

"My understanding of the issue is that it is somewhat two-fold. First, the question of whether travel from (city) to (city) was reasonable and necessary in conjunction with whether the travel actually occurred or not. Is that -- is that the basic issue in this hearing?

[Respondent's counsel]: That's my understanding of the basic issue. There are a couple of peripheral issues; one is jurisdictional, whether there is a medical dispute or not. The other is, how much mileage is there between (claimant)' residence in (city) and the medical providers in (city)."

At the outset of the contested case hearing, respondent urged a motion in the nature of a plea to the jurisdiction of the hearing or a plea in abatement. Respondent pointed out that Article 8308-8.26 (1989 Act) provides for the resolution of medical disputes; that the 1989 Act [Article 8308-8.21] requires the Commission to adopt rules for medical dispute resolution; that Chapter 134 of the TWCC Rules concerns medical services and benefits; and, that within Chapter 134 is found Rule 134.6 providing for the reimbursement of travel expenses "when it becomes reasonable and necessary for an injured employee to travel to obtain appropriate and necessary medical care . . ." At the hearing, respondent viewed the

Rule 134.6 provision for reimbursement of travel expenses as a "part of the insurance carrier's responsibility as medical benefits," and asserted that the issue was "in the nature of a medical dispute because mileage is part of the medical benefits, . . ." Respondent contended that the "proper forum" for resolution of this issue was the Commission's medical review division in (city), Texas, and noted that a decision by that forum could be taken to an APTRA (Administrative Procedures Texas Register Act) hearing. Respondent urged the hearing officer to abate the hearing and send the dispute to the Commission's medical review division for resolution. The hearing officer denied respondent's motion but invited respondent to urge it again at the conclusion of the hearing. When respondent did reurge the motion at the conclusion of the hearing, the hearing officer did not rule but took the motion under advisement. We must conclude the motion was again denied in view of the Decision and Order signed by the hearing officer on December 13, 1991. In that document the hearing officer drew legal conclusions that appellant was "entitled to receive as a supplementation of medical benefits" mileage reimbursement from respondent for travel (the shortest route) between appellant's residence in (city) and the offices of her physicians and the imaging center in (city) from the date of her injury ((date of injury) ) to the date of the hearing [December 11, 1991], but that appellant was not similarly entitled to travel expense reimbursement "as a supplementation of medical benefits" for her drives to (city) for physical therapy. Those conclusions of law were based in part upon the following findings of fact:

- "3. Claimant (claimant) sustained an injury to her jaw, neck, lower back and legs while working for the (Employer) on (date of injury), in (County), Texas.
4. From the date of injury of (date of injury), to the date of this Benefit Contested Case Hearing, Claimant (claimant) has physically resided at (address), (city), Texas.
5. From the date of injury of (date of injury), to the date of this Benefit Contested Case Hearing, it has been reasonably necessary for Claimant (claimant) to travel to and from her residence in (city), Texas, and her physicians and St. Mary's Imaging Center in (city), Texas, in order to obtain appropriate and necessary medical care by physicians.
6. The distance from Claimant (claimant)'s residence in (city), Texas, to her physicians and (Center) in (city), Texas, is greater than 20 miles, one way, but less than the mileage claimed by Claimant (claimant).
7. From the date of injury of (date of injury), to the date of this Benefit Contested Case Hearing, it has not been reasonably necessary for Claimant to travel in order to obtain appropriate and necessary medical care in the nature of physical therapy in that appropriate physical therapy treatment is available in

(city), Texas, less than twenty miles, one way, from the residence of (Claimant)."

We agree with respondent that the issue of appellant's entitlement to reimbursement for travel expenses to her physicians' offices, to the imaging center, and to the facility in (city) for physical therapy treatment should have been presented for review by the Commission's medical review division. The benefit review officer and later the contested case hearing officer when asked to consider the reasonable necessity of such travel were inappropriately called upon to decide matters relating to "appropriate and necessary medical care." Such matters fall within the purview of medical dispute resolution by the Commission's medical review division.

Article 8308-4.61 (1989 Act) entitles an injured employee "to all health care reasonably required by the nature of the compensable injury as and when needed," and provides that "[M]edical benefits are payable from the date of injury . . . ." Article 8308-1.03(20) defines "health care" to include not only medical aid, examinations, treatments, diagnoses, evaluations and services, but also physical therapy services provided by or at the direction of a doctor. Article 8308-4.62 entitles an "injured employee to the employee's initial choice of a doctor." The 1989 Act does not expressly address the reimbursement of an injured employee's travel expenses incurred in obtaining such health care. However, Article 8308-2.09 does require the Commission to "adopt rules as necessary for the implementation and enforcement of this Act;" and, "a rule's provisions should be in harmony with the general objectives of that act. Gerst v. Oak Cliff Savings & Loan Assn., 432 S.W.2d 702 (Tex. 1968)." Texas Workers' Compensation Commission Appeal No. 91073 (Docket No. VT-91-053523-01-CC-CC41) decided December 20, 1991, p.2.

On July 25, 1991, the Commission adopted Rule 134.6 which became effective on September 2, 1991. Rule 134.6(a) provides that "[W]hen it becomes reasonably necessary for an injured employee to travel in order to obtain appropriate and necessary medical care for the injured employee's compensable injury, the reasonable cost shall be paid by the insurance carrier. . . ." The Rule goes on to provide that reimbursement is due only when the one-way distance exceeds 20 miles, that the mileage reimbursement rate is determined by the current travel rate for state employees, and, that the shortest route between two points shall be used. The Rule does not provide for retroactive application. The hearing officer took official notice of Rule 134.6 and cited the rule as the basis for his conclusions of law that appellant was entitled to mileage reimbursement for visits to her physicians and imaging center from (date of injury), through December 11, 1991, but not for her visits to the physical therapy facility. Neither of the parties cited any authority at the hearing below or upon this appeal for the retroactive application of Rule 134.6, nor did the parties refer to, let alone contend, that the predecessor rule (28 TEX. ADMIN. CODE § 42.175(b)) was applicable to compensable injuries sustained after January 1, 1991. Rule 134.6 is found in Chapter 134, entitled "Guidelines For Medical Services, Charges, and Payments." Article 8308-8.26, entitled "Medical Dispute Resolution," provides in Article 8308-8.26(d) that "[A] party to a medical dispute that remains unresolved after a review of medical services as provided by this section is eligible to proceed to a hearing . . . ." And see Rule 133.305

(TWCC Rules), entitled "Request For Medical Dispute Resolution," found in "Chapter 133 - Benefits -- Medical Benefits," Subchapter D -- Dispute And Audit of Bills By Insurance Carriers." In our view, disputes relating to "appropriate and necessary medical care for the injured employee's compensable injury" and whether travel to obtain same is "reasonably necessary" should be submitted for review pursuant to the medical dispute resolution provisions of the 1989 Act and TWCC Rules.

At the hearing below, evidence was adduced that appellant had tripped over a bookrack and fallen at her place of employment sustaining injuries to her jaw, neck, back and legs. The evidence showed that appellant obtained frequent physical therapy treatments at a facility in (city) during the period from late May 1991, to late November, 1991. While evidence was adduced that a physical therapy facility existed in (city), there was some conflict in the evidence as to whether or not appellant's physician wanted her to undergo her physical therapy in (city) or in (city). The evidence did not describe nor establish the nature of the physical therapy appellant received in (city) nor did it establish whether or not equivalent therapy was available to appellant at the facility in (city). Such information, or the lack thereof, can of course be considered by the Commission's medical review division in its review of the issue.

The hearing officer's decision and order are reversed and rendered that the parties' dispute be reviewed by the Commission's medical review division.

---

Philip F. O'Neill  
Appeals Judge

CONCUR:

---

Stark O. Sanders, Jr.  
Chief Appeals Judge

---

Susan M. Kelley  
Appeals Judge